IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 559.

THE CITY OF HUNTINGTON BEACH, a municipal corporation,

Petitioner,

vs.

E. C. DENIO, G. A. HART, G. P. TAUBMAN, JR., and M. C. SIMPSON, partners, under the firm name and style of DENIO, HART, TAUBMAN AND SIMPSON,

Respondents.

Reply to Respondents' Brief in Opposition to Granting of the Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The reply brief filed by Respondents in this matter is chiefly remarkable for its entire avoidance of any discussion of the grounds upon which the writ of certiorari is sought; namely, a denial to Petitioner of the equal protection of the laws of the State of California, and that your Petitioner has been deprived of its property without due process of law.

Respondents do not dispute (1) that in the original action against Petitioner they sought recovery of 10% of certain monies received by Petitioner amounting to $2,794.09; (2) that they recovered judgment only for the sum of $2,000.00; (3) that such a judgment has two aspects, being a judgment that the plaintiffs therein were entitled to recover $2,000.00, and also being a judgment that they were not entitled to recover any greater sum; (4) that the judgment in the present case applies the doctrine of *res judicata* in favor of Respondents to the first aspect of that former judgment but refuses to apply it in favor of Petitioner to the second aspect of that same judgment. Respondents advance no reason, or even argument, why such action of the California courts does not deprive your Petitioner of the equal protection of that doctrine.

Respondents likewise fail to point out what is the basis in law upon which your Petitioner is deprived of a full 10% of the moneys received by it. Respondents fail to advance any reason, or even argument, why such a judgment for 10% of certain moneys based solely on a prior award of 7.1% thereof does not deprive your Petitioner of at least the excess over said 7.1% without due process of law.

Respondents attempt to construe the opinion of the California Supreme Court in the former action into a holding that they were entitled to recover the full contract percentages. Actually all that court held was [R. p. 116]:

> "We conclude that the evidence is not insufficient to support any essential implied finding, and that no prejudicial error has been shown."

The only finding essential to support the judgment was that respondents had rendered services to and at the request of Petitioner of the value of $2,000.00.

Moreover, it is the judgment as rendered by the trial court and not any opinion rendered by a court on appeal that alone constitutes *res judicata.* (See Brief in Support of Petitioner, p. 29, to which Respondents make no answer.)

Respondents say that Petitioner cannot complain because the verdict in the former action was less than Respondents were entitled to. This is assuming that such verdict was too small, an assumption which runs directly contrary to the entire theory of the doctrine of *res judicata,* upon which alone Respondents can rely. Moreover, Petitioner is not complaining of the amount of that verdict. Petitioner is standing on that verdict. (See Brief in Support of Petition, pp. 16, 17.)

Respondents claim that the judgment in the first action could not be for the reasonable value of their services. They base this contention (Rep. Br. pp. 6 to 8) upon the proposition that a common count is often deemed merged into a more detailed count in a complaint. They attempt no answer to the authorities cited by us that this is not always so and that in this case they are estopped to contend that any such merger existed. (Brief in Support of Petition pp. 24-29.) They do not dispute that the basis of the verdict in that former case had to be one of three things: (1) The contract percentages; (2) A purely arbitrary award; or (3) The reasonable value of Respondents' services. Obviously, the verdict was not based on the contract percentages. It is presumed that it was not a purely arbitrary award. This leaves only the

reasonable value of Respondents' services as a possible basis for that verdict. Respondents suggest no other basis whatsoever.

Next Respondents say (Rep. Br. pp. 9, 10) that the decision of the State District Court of Appeal in this case is correct in holding that the former judgment constituted *res judicata*. That is the point of this petition for writ of certiorari. If the judgment in the former action constitutes *res judicata* as to this action, then it constitutes *res judicata* partially in favor of Respondents and partially in favor of your Petitioner, and the California courts were not justified in applying the judgment solely as *res judicata* in favor of Respondents.

Finally Respondents contend that the State District Court of Appeal, in affirming the judgment in the original case, passed adversely to Petitioner's contentions with regard to certain constitutional points raised in the petition for writ of certiorari. If it had not done so there would have been no necessity for this petition.

Wherefore, it is respectfully submitted that the petition for writ of certiorari should be granted so that your Petitioner will not be denied the equal protection of the laws of the State of California, or be deprived of its property, or any part thereof, without due process of law.

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